

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Providing Eligible Entities Access)	WC Docket No. 07-38
to Aggregate Form 477 Data)	
as Required by the)	GN Docket Nos. 09-47, 09-51
Broadband Data Improvement Act)	

COMMENTS OF XO COMMUNICATIONS, LLC

XO Communications, LLC (“XO Communications”) hereby comments on the Commission’s *Public Notice* regarding implementation of Section 106(h) of the Broadband Data Improvement Act (“BDIA”).¹ XO urges the Commission to protect broadband providers by eliminating company-specific information to the extent possible from the FCC Form 477 data delivered to state and nonprofit entities pursuant to the BDIA. At the same time, to promote valuable broadband mapping products, the Commission should provide Form 477 data to these entities in their existing granular form. The Commission should also encourage confidentiality agreements between these mapping entities and broadband operators voluntarily providing these entities with additional disaggregated broadband data.

I. THE COMMISSION SHOULD PROTECT THE CONFIDENTIALITY OF COMPETITIVELY SENSITIVE DATA WHILE AT THE SAME TIME PROMOTING USEFUL BROADBAND MAPPING

The BDIA directs the Department of Commerce to award grants to qualifying state, municipal, and nonprofit entities undertaking statewide broadband mapping

¹ *Comment Sought on Providing Eligible Entities Access to Aggregate Form 477 Data as Required by the Broadband Data Improvement Act*, WC Docket No. 07-38, GN Docket Nos. 09-47, 09-51, Public Notice, DA 09-1550 (rel. July 17, 2009) (“*Public Notice*”); Broadband Data Improvement Act of 2008 (“BDIA”), Pub. L. No. 110-385, 122 Stat. 4096 (codified at 47 U.S.C. §§ 1301-1304).

initiatives.² Section 106(h)(1) of the BDIA directs the Commission to give these “eligible entities” access to aggregate data collected through its Form 477 broadband reporting requirement. Section 106(h)(2) further requires these eligible entities to protect the confidentiality of competitively sensitive information contained in the Form 477 data furnished by the Commission or voluntarily supplied by broadband providers. In the *Public Notice*, the Commission asks to what extent it should aggregate the Form 477 data provided to these eligible entities, and whether it should take any measures to ensure these entities’ compliance with the Section 106(h)(2) confidentiality requirements.

As the Commission implements these provisions of the BDIA, XO urges the Commission to pursue two key goals. First, the Commission should maintain the confidentiality of broadband providers’ competitively sensitive data. As the Commission acknowledged when it adopted the Form 477 broadband reporting requirements in 2000, protection of company-specific data is necessary to safeguard competition.³ The Commission noted in that order that absent adequate protections against disclosure, competitors would be able to “take the data submitted and tailor market strategies to quash nascent competition, protect areas that are being subjected to increased competition, or deploy facilities to defend strongholds.”⁴ A federal district court in 2007 affirmed the Commission’s view of the sensitivity of the Form 477 data. Specifically, the court rejected a Freedom of Information Act (“FOIA”) request for access to non-

² 47 U.S.C. § 1304(b).

³ *Local Telephone Competition and Broadband Reporting*, Report and Order, 15 FCC Rcd 7717, ¶ 88 (2000).

⁴ *Id.* Given the competitive sensitivity of company-specific information, the Commission decided not to publish individual provider-filed broadband data in its publicly-available reports, even where providers do not formally seek non-disclosure of this Form 477 data. *Id.* ¶ 91.

aggregated Form 477 data on the ground that such disclosure would likely cause competitive injury.⁵

XO recognizes that preserving the confidentiality of a provider's Form 477 data is not the Commission's sole public interest concern as it implements this statute. It is also critical that BDIA grantees produce reliable broadband mapping products. High-quality broadband maps will be a valuable ongoing resource for the public sector, public interest groups, broadband providers, and other industry participants as all parties work to expand broadband availability throughout the United States.

To further these goals, the Commission should take certain specific actions as it implements Section 106(h). First, to safeguard broadband providers from competitive harm, the FCC should aggregate the Form 477 data provided by broadband firms in each census tract area after removing any references to specific providers. This approach will exclude the names of individual broadband providers and eliminate company-specific information to the extent possible. Because XO faces facilities-based broadband competition in all markets where it provides broadband Internet access service, such data aggregation should be sufficient to protect the confidentiality of the disaggregated information provided by XO in its Form 477 reports. At the same time, furnishing aggregated Form 477 data at the same level of granularity as required by the Commission's reports should contribute importantly to the development of reliable, informative broadband maps. Eligible entities should have access to aggregated data that

⁵ *Center for Public Integrity v. FCC*, 505 F. Supp. 2d 106 (D.D.C. 2007), *recon. denied*, 515 F. Supp. 2d 167 (D.D.C. 2007).

is focused on census tracts and that reflects Form 477's existing tiered options for broadband data speeds.⁶

The Commission's safeguards also should address the possibility that broadband providers may wish to provide additional data on a disaggregated basis to the mapping entities, as contemplated by section 106(h)(2). In order to protect the confidentiality of the data and encourage such voluntary data contributions, the Commission should recommend that eligible entities and contributing broadband providers enter into effective non-disclosure agreements ("NDAs") that will prevent the disclosure of the data pursuant to FOIA or other action. These negotiated agreements can include damages provisions that apply to disclosures of competitively sensitive information, thereby eliminating the need for Commission enforcement in those cases.

The Commission, eligible entities, and broadband providers around the country should look to the statewide mapping initiative in the Commonwealth of Virginia as a model for encouraging operator participation. In Virginia, more than twenty-five service providers (including XO) entered into NDAs with the Center for Innovative Technology ("CIT") and voluntarily provided data to CIT in support of the Virginia broadband mapping initiative. Through the collaborative efforts of these providers, CIT, the Virginia Information Technology Agency, and Virginia's Office of Telework Promotion and Broadband Assistance, this broadband mapping project was completed in May 2009

⁶ The Commission's provision of granular Form 477 data to eligible entities in states around the country makes separate state broadband reporting programs duplicative and unnecessary. Accordingly, the Commission should prohibit any state from imposing mandatory broadband reporting requirements during any year in which the Commission is providing data to an eligible entity in that state pursuant to the BDIA.

at no cost to the state.⁷ Pursuant to the NDAs, CIT has fully maintained the confidentiality of broadband providers' competitively sensitive data. In implementing the BDIA, the Commission should work to promote similar broadband mapping results in other states.

II. CONCLUSION

For the aforementioned reasons, XO urges the Commission to implement Section 106(h) of the Broadband Data Improvement Act as described in these Comments.

Respectfully submitted,

/s/ Heather Burnett Gold
Heather Burnett Gold
Senior Vice President
heather.b.gold@xo.com

Lisa R. Youngers
Vice President, Federal Affairs
lisa.r.youngers@xo.com

XO Communications, LLC
13865 Sunrise Valley Drive
Herndon, VA 20171
703-547-2000

Regina M. Keeney
Stephen J. Berman
Lawler, Metzger, Keeney & Logan, LLC
2001 K Street, NW, Suite 802
Washington, DC 20006
(202) 777-7700
Counsel for XO Communications, LLC

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⁷ See *Governor Kaine Releases Broadband Availability Map*, Press Release, Commonwealth of Virginia, Office of the Governor (May 14, 2009) available at: <<http://www.otpb.vi.virginia.gov/pdf/05.14.09%20Broadband.doc>>.